Supreme Court, U.S.
FILED
APR 8 1994
OFFICE OF THE CLERK

(6)

No. 93-981

# In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

*v.*

RESHAT SHABANI

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## JOINT APPENDIX

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**PETITION FOR WRIT OF CERTIORARI FILED**
**DECEMBER 21, 1993**
**CERTIORARI GRANTED FEBRUARY 22, 1994**

BEST AVAILABLE COPY

49pp

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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Docket No. CR 90-063HRH

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

RESHAT SHABANI, DEFENDANT

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**DOCKET ENTRIES**

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| | | |
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| 1990 | | |
| Aug. 29 | (1) | Fld INDICTMENT. |
| 29 | (2) | Fld GRAND JURY MINS: pre-trial detention, set for arrgn. |
| 29 | (3) | Fld documents transferred from A90-126M; MAG Mo re init appear, MAG CRT MIN re init appear, MAG ORDER of temp detent, CY 4 CJA 20, MAG CRT MIN re prelim/detent hearing MAG ORDER of detent pend trial, MAG MO re appoint of interpreter, warrent [*sic*] of arrest, cy 1 CJA 20, clerk's not re interpreter fees. |
| 30 | (4) | Fld MAG MO setting arrgnment for Tues, 9/4/90 @ 11:00 A.M. in Rm 176. Cy J. Bottini, J. Murtagh, R. Vrlaka, USM, PO,EW. |

1990

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| Sept. 4 | (5) | Fld MAG CRT MIN re arraign-ment. Pleads NG. Def DE-TAINED pretrial deadlines set. Cy J. Bottini, J. Murtagh, USM, PO, FA. |
| 4 | (6) | Fld MAG ORDER re prep for trial. Cnsl to meet by 9/7/90 Mots due by 9/21/90. Cy J. Bottini, J. Murtagh. |
| 6 | (—) | Sent notice to Judge Holland re ST deadlines. Cy Tr |
| 11 | (7) | Fld CRT MIN TBJ set for Mon, 10/22/90 @9:00 A.M. deadlines set. Cy J. Bottini, J. Murtagh, R. Vrlaka, PO, USM, Jury Clerk, Mag B. |
| 21 | (8) | Fld def's mot for order of preserv of & product of (in camera if necess) agent's notes of interviews as Jencks Act materials. |
| 21 | (9) | Fld def's request for exculpatory material pursuant to Brady v. Maryland w/atch afdvt. |
| 21 | (10) | Fld def's mot for names and addres [*sic*] of all witness to investigation in case and whom plft not call at trial. |
| 21 | (11) | Fld def's mot leave to file mot B/P 20 day after arrngment and B/P : overt acts of alleged conspiracy, known unindicted co-conspir. |



1990

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| Sept. 21 | (12) | Fld def's mot, in camera inspect of closed portion of sent in A90-023CR for Brady materials w/atch afdvt. |
| 21 | (13) | Fld def's mot for discvy & inspect pursuant to Rule 16(a)(1)(D) w/atch afdvt. |
| 21 | (14) | Fld def's mot for order direct plat to disclose: surval logs, audio record, video record, photos, and pen regist from A90-023CR & A90-024CR w/atch memos. |
| 25 | (15) | Fld pltf's non-opp mot for 3 day ext to respond to def's mots w/atch afdvt. |
| 27 | (15) | Fld MAG ORDER grant pltf's non-opp mot for 3 day ext. Cy J. Bottini, J. Murtagh. |
| Oct. 4 | (16) | Fld pltf's resp to def's mot for names & address of all witness to the investigation, A90-023CR, A90-024CR, whom pltf does not intend to call. |
| 4 | (17) | Fld pltf's resp to def's mot for discvy & inspect pursuant to Rule 16. |
| 4 | (18) | Fld pltf's resp to def's mot for order of preserv of & product of agent's notes of interview as Jencks Act material. |

1990

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| Oct. | 5 | (19) | Fld pltf's opp to def's request for exculpatory material. |
| | 5 | (20) | Fld pltf's resp to def's mot for B/P w/atch memo. |
| | 5 | (21) | Fld pltf's resp to def's mot for in camera inspec of closed portion of sent in A90-023CR for Brady material. |
| | 9 | (22) | Fld MAG MO re hearing on PTMs set for Fri, 10-12-90 at 10:00 A.M. Cy J. Bottini, J. Murtagh, USM,PO. |
| | 9 | (23) | Fld pltf's resp to def's mot for order direct govt to disclose logs, recordings photos from inter-related cases. |
| | 11 | (24) | Fld pltf's trial memo. |
| | 11 | (25) | Fld pltf's proposed jury instructions. |
| | 11 | (26) | Fld pltf's proposed voir dire questions. |
| | 12 | (27) | Fld def's reply to pltf's resp to def's mot for B/P. |
| | 12 | (28) | Fld def's reply to pltf's resp to defs' mot for order direct pltf to disclose: logs, recordings, photos, from inter-related cases. |
| | 12 | (29) | Fld def's reply to pltf's opp to def's request for exculpatory material. |



1990

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| Oct. | 12 | (30) | Fld def's reply to pltf's resp to def's mot for names/address of witnesses to case A90-023CR, A90-024CR, whom pltf does not intend to call. |
| | 12 | (31) | Fld def's reply to pltf's resp to def's mot for discvy/inspection pursuant to Rule 16(a)(1)(A). |
| | 12 | (32) | Fld def's reply to pltf's resp to def's mot for order of preservat of/and product of agent's notes as Jencks Act Material. |
| | 12 | (33) | Fld def's reply to pltf's resp to def's mot for in camera inspect of closed portion of IOS in A90-023CR, Brady material. |
| | 15 | (34) | Fld def's proposed voir dire questions on behalf of def personal, occupational & education background w/atch memo. |
| | 15 | (35) | Fld MAG CRT MIN dated 10-12-90 re hearing on all pend discvy mots; individual mot signed and file herewith. Cy J. Bottini, J. Murtagh, Finan Admin. |
| | 15 | (36) | Fld MAG ORDER re def's mot for order direct disclose; grant as ordered. Cy J. Bottini, J. Murtagh. (#14) |

1990

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| Oct. | 15 | (37) | Fld MAG ORDER re def's request for exulpatory info pltf does not intend to call at trial. Cy J. Bottini, J. Murtagh. Granted as ordered. (#10) |
| | 15 | (38) | Fld MAG ORDER grant mot for in camera inspect of closed portion of IOS in A90-023CR (#12). Cy J. Bottini, J. Murtagh. |
| | 15 | (39) | Fld MAG ORDER grant mot for discvy & inspect pursuant to Rule 16. Cy J. Bottini, J. Murtagh. (#13) |
| | 15 | (40) | Fld MAG ORDER deny def's mot for leave to file mot for B/P 20 days after arrngment (#11). Cy J. Bottini, J. Murtagh. |
| | 15 | (41) | Fld MAG ORDER grant def's mot for order of preservat of & production of agent's notes as Jencks Act Material. Cy J. Bottini, J. Murtagh. (#8) |
| | 18 | (42) | Fld MAG ORDER re def's mot for disclose of surveil logs; granted as written. Cy J. Bottini, J. Murtagh. |
| | 19 | (43) | Fld def's trial memo re in camera review. |
| | 22 | (44) | Fld CRT-MIN re defs; TBJ on 10-22-90 is vacated, to be reset, deadlines set re filing of brief on the witness question. Cy J. Bottini, J. |



1990

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| Oct. | 22 | (44) | Murtagh, USM, PO, Mag B, Jury Clerk, Finan Admin, R[.] Vrlaku. |
| | 23 | (—) | Sent Judge Holland Memo re St deadlines. |
| | 24 | (45) | Fld ORDER re case status; reply by pltf by 10-24, def reply 10-29. Cy J. Bottini, J. Murtagh, R. Cavanaugh, MAG B. |
| | 24 | (46) | Fld pltf's memo re invocation of 5th Amend right by witness. |
| | 29 | (47) | Fld def's resp to pltf's memo re invocation 5th amend rights by witness w/atch afdvt. |
| Nov. | 6 | (48) | Fld MO set TBJ for Mon, 11-26-90 at 9:00 A.M. Cy J. Bottini, J. Murtagh, R. Vrlaka, Mag B, USM, PO, Jury Clerk. |
| | 7 | (49) | Fld ORDER re witness; further hearing set 11-15-90 at 9:15 A.M. Cy J. [B]ottini, J. Murtagh, R. Vrlaka. |
| | 13 | (50) | Fld def's mot to cont TBJ w/atch afdvt. |
| | 14 | (51) | Fld pltf's mot to compel testimony of D. Pinjoli. |
| | 15 | (52) | Fld ORDER resched TBJ for 11-28-90 at 9:00 A.M. and hearing on 11-15-90 is vacated and reset for 11-26-90 at 9:00 A.M. Cy J. Bottini, J. Murtagh, USM, PO, Jury Clerk. |

1990

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| Nov. 16 | (53) | Fld CRT MIN re hearing re Pinjoli as Witness; hearing cont until 11-26-90 at 9:00 A.M., TBJ reset for Wed, 11-28-90 at 9:00 A.M. Cy K. Loeffler J. Murtagh, R. Cavanaugh, USM, PO, Jury Clerk. |
| 26 | (54) | Fld CRT MIN re hearing on witness; Crt sign order compel witness to testify; R. Cavanaugh as cnsl to witness, Isan Ajdari appted as interpreter in place of R. Vrlaka. Cy J. Bottini, J. Murtagh, R. Cavanaugh, I. Ajdari, R. Vrlaka, USM, PO, Finan Admin. |
| 26 | (55) | Fld ORDER compelling testimony of D. Pinjoli. Cy J. Bottini, J. Murtagh, R. Cavanaugh. |
| 28 | (56) | Fld CRT MIN re TBJ; TBJ is vacated to be reset for a later date, cnsl to fle mot re indictment, Pinjoli testimony by 12-2-90. Hearing set for 12-10-90 at 8:30 A.M. Cy J. Bottini, J. Murtagh, USM, PO, Jury Clerk, Mag B, Isan Ajdari, Finan Admin. |
| 29 | (57) | Fld ORDER vacate TBJ to a later date, deadlines set re mots. Cy J. Bottini, J. Murtagh, R. Cavanaugh, I. Ajdari. |
| Dec. 3 | (58) | Fld pltf's mot to intro prior trial testimony of Pinjoli w/atch afdvt. |



1990

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| Dec. 3 | (59) | Fld def's mot to dismiss indictment for failure to allege essential element w/atch memo. |
| 7 | (60) | Fld pltf's memo in opp to def's mot to dismiss & in supp of pltf's prop jury instruct re overt acts. |
| 7 | (61) | Fld def's opp to pltf's mot to intro prior trial testimony of D. Pinjoli w/atch afdvt. |
| 7 | (62) | Fld Entry of Appearance for Witness Pinjoli by R. Cavanaugh. |
| 7 | (63) | Fld afdvt of cnsl by R. Cavanaugh. |
| 10 | (64) | Fld CRT MIN re hearing on mots re indictment; I. Ajdari appt interpreter, mot to dismiss denied, pltf's mot to intro prior testimony resched for 12-11-90 at 8:30 A.M. Cy J. Bottini, J. Murtagh, PO, USM. |
| 11 | (65) | Fld MO set TBJ for Mon, 1-14-91 at 9:00 A.M. Cy J. Bottini, J. Murtagh, USM, PO, Jury Clerk, Mag B. |
| 11 | (66) | Fld CRT MIN re hearing on mot re indictment and testimony of witness; TBJ set 1-14-91 at 9:00 A.M. Cy J. Bottini, J. Murtagh. |
| 11 | (67) | Fld ORDER appt interpreter. Cy J. Bottini, J. Murtagh, USM, PO, I. Ajdari, Finan Admin. |

1991

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| Jan. 7 | (68) | Fld ORDER re notice to cnsl; re witness. Cy K. Loeffler, J. Murtagh, R. Cavanaugh. |
| 11 | (69) | Fld ORDER appt. R. Cavanaugh as cnsl for D. Pinjoli. Cy J. Bottini, J. Murtagh, R. Cavanaugh, USM, PO. |
| 14 | (70) | Fld CRT MIN re TBJ-Day 1; cont 1-15-91. |
| 14 | (71) | Fld pltf's stip re exhibits 1 & 2. |
| 15 | (72) | Fld CRT MIN re TBJ day 2; cont til 1-16-91. |
| 16 | (73) | Fld CRT MIN re TBJ day 3; jury begins deliberate. |
| 17 | (74) | Fld MO set contempt hearing re Witness Pinjoli for Thurs, 1-17-91 at 1:30 p.m. Cy J. Bottini, J. Murtagh R. Cavanaugh, USM, PTS. |
| 17 | (75) | Fld CRT MIN re TBJ day 4; def found guilty, IOS set 3-21-91 at 8:30 A.M., def to remain in cust w/atch jury notes. Cy J. Bottini, J. Murtagh, R. Cavanaugh, USM, PO, Mag B. |
| 17 | (76) | Fld jury instructions. |
| 17 | (77) | Fld CRT MIN re contempt hearing on Witness Pinjoli; guilty of criminal contempt, sent 4 mos addtl to |



1991

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| Mar. 17 | (77) | other sent, to serve consecutive. Cy J. Bottini, J. Murtagh, R. Cavanaugh, USM, PO. |
| 18 | (78) | Fld cy 4 of CJA 20 re witness Pinjoli to R. Cavanaugh. |
| 15 | (79) | Fld pltf's sent memo & non-opp to present report. |
| 19 | (80) | Fld def's mot for exped consider re cont IOS w/atch afdvt. |
| 19 | (81) | Fld def's non-opp to cont IOS w/atch afdvt. |
| 19 | (82) | Fld ORDER grant def's mot for exped consider. |
| 19 | (83) | Fld ORDER reset IOS for 4-11-91 at 8:30. Cy J. Bottini, I. Ajdari, J. Murtagh, USM, PO. |
| 20 | (—) | Fld REPORTER'S TRANSCRIPTS RE TBJ (PLACED BEHIND FILE IN BINDER)<br>Vol. 1 TBJ Day 1 - 1-14-91<br>Vol. 2 TBJ Day 2 - 1-15-91<br>Vol. 3 TBJ Day 3 - 1-16-91<br>Vol. 4 TBJ Day 4 - 1-17-91 |
| Apr. 4 | (84) | Fld def's obj to present report. |
| 11 | (85) | Fld def's mot & appli for non-res cnsl. |
| 11 | (86) | Fld CRT MIN re IOS; to cont at later date, G. Howard to submit entry of appear, J. Murtagh, to w/d. |

1991

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| Apr. | 11 | (86) | Cy J. Bottini, J. Murtagh, G. Howard, USM, PO. |
| | 16 | (87) | Fld ORDER re IOS cont; IOS to be reset. Cy J. Bottini, G. Howard, USM, PO. |
| | 16 | (88) | Fld MO def's mot for non-assoc non-res cnsl denied. Cy J. Bottini, G. Howard, USM, PTS. |
| | 23 | (—) | Fld REPORTER'S TRANSCRIPT RE:<br>(Placed behind file in binder)<br>TBJ date 10-22-90<br>Hearing on mot to compel testimony - 11-26-91.<br>TBJ date 11-28-90<br>Hearing on mot to dismiss indict - 12-10-90.<br>Hearing on mot to employ TBJ test & mots re indict - 12-11-90. |
| | 25 | (89) | Fld pltf's mot to strke def's mot for new TBJ, or deny mot w/atch memo. |
| May | 21 | (90) | Fld cy 1 CJA 20 approv pymt in amt of $1,387.50 to R. Cavanaugh re Witness Pinjoli. |
| | 21 | (89) | Fld ORDER grant pltf's mot to strike def's mot for new TBJ. Cy J. Bottini, J. Murtagh. |
| | 22 | (91) | Fld MO set IOS for Thurs, 5-30-91 at 8:30. Cy J. Bottini, J. Murtagh, USM, PO. |



1991

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| May | 28 | (92) | Fld pltf's mot on short time to cont IOS w/atch afdvt. |
| | 28 | (93) | Fld def's consent to appear as local cnsl - J. Gibbons. |
| | 28 | (92) | Fld ORDER grant pltf's mot to cont IOS; IOS reset for 6-5-91 at 8:30. Cy J. Bottini, J. Gibbons, G. Howard, I. Ajdari, USM, PO. |
| June | 5 | (94) | Fld CRT MIN re IOS; ECR Peerce; sent 160 mos, sprvsd rel 60 mos, spec asses $50.00, cnsl's appli to be atch to J. Gibbons consent to proceed (#93). |
| | 5 | (95) | Fld JUDGMENT - fnd G to Ct I, sent 160 mos, 60 mos sprvsd rel unless deprted, spec asses $50.00. Cy J. Bottini, J. Gibbons, G. Howard, R. Shabani, USM, PO, MAG B, Carmen. |
| | 17 | (96) | Fld def not of appeal. cc G.Howard, J.Gibbons, J. Bottini, Judge Holland, 9CCA. |
| July | 1 | (—) | Fld REPORTER'S TRANSCRIPT RE IOS ON 6-5-91. Cy PO. (Placed in binder behind file) |
| Aug | 2 | (97) | Fld cert cy of Judgment def deliver 7-17-91. |
| Nov | 21 | (98) | Fld exec subpoenas. |

1992

Mar. 16 (99) Fld cy 9CCA order re brief sched, no cert record, new cnsl.



UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Docket No. 91-30224

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

RESHAT SHABANI, DEFENDANT-APPELLANT

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**DOCKET ENTRIES**

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7/3/91 DOCKET CAUSE AND ENTERED APPEARANCES OF COUNSEL. Filed in D.C. on 6/17/91; setting schedule as follows: transcript shall be ordered by 7/8/91 for Reshat Shabani; transcript shall be filed by <date not set>; appellants' briefs, excerpts due by 9/16/91 for Reshat Shabani; appellees' brief due 10/16/91 for USA; appellants' reply brief due by 10/30/91 for Reshat Shabani. (RT required: y) (Sentence imp 160 mos) [91-30224] (wp)

7/30/91 USCA receipt for payment (010694) for the amount of $100 (date paid: 7/22/91) Copy of receipt sent to DC. [91-30224] (tsp)

2/11/92 Filed 42-1 Order to Show Cause for failure to file an opening brief [91-30224] Response due in fourteen days. [91-30224] (sm)

2/24/92 Received Appellant Reshat Shabani's response to order to show cause, re: non filing of appellant's opening brief (PROMO) Received check number 2772 dated 02/19/92 in the amount of $250.00 (FINANCE UNIT) [91-30224] (sm)

2/26/92 Received notice of appearance of Alan M. Caplan (Withdrew as counsel): attorney George C. Howard for Reshat Shabani) (CASEFILE) [91-30224] (sm)

2/26/92 Filed Appellant Reshat Shabani's motion to extend time to file appellant's opening brief ("motion for the setting of new briefing schedule due to the failure of prior counsel t [*sic*] comply with the previously set briefing schedule") served o [*sic*] 2/26/92 [2082495] (PROMO) (sm)

3/11/92 Filed order (Deputy Clerk: cb) The court is in receipt of Attorney Alan M. Caplan's notice of entry of appearance. The service list shall be amended accordingly. The court is also in receipt of former counsel's response to the order to show cause. On or before 03/25/92, former counsel shall send appellant's file to current counsel. If Attorney Howard fails to do so, Attorney Caplan shall inform this court immediately. The briefing schedule is as follows: the opening brief and excerpts of record are due 04/24/92, the answering brief is due 05/26/92, and the optional reply brief is due 14 days from



service of the answering brief. Court records do not currently reflect that the district court has issued the certificate of record. Appellant shall monitor the issuance of the certificate; absence of the certificate will block resolution of the appeal. Appellant is informed that a motion for procedural relief does not fall within the category of motions contemplated by Ninth Cir. R. 27-3. Subject to reconsideration if any objections filed within 10 days. [91-30224] (sm)

5/1/92 Filed motion of Appellant and deputy clerk order : (Deputy Clerk: ra) granting motion & order to extend time to file appellant's opening brief [2125241-1] appellants' opening brief due 5/26/92; the optional reply brief is due 14 days from service of the answering brief. No further extension of time to file the opening brief will be granted. Movant is informed that a motion for an extension of time to file a brief should include the position of opposing csl. (Motion recvd 4/15/92) [91-30224] (mhf)

5/5/92 Received from attorney George Howard Cashier's check number 1407604 dated 04/28/91 in response to order to show cause. (originally check bounced) (CASEFILE) [91-30224] (sm)

5/26/92 Filed original and 15 copies Appellant Reshat Shabani opening brief (Informal:

n) 41 pages and five excerpts of record in 1 volumes; served on 5/22/92 [91-30224] (sm)

5/27/92 Filed pre-sentencing report UNDER SEAL. [91-30224] (sm)

6/1/92 Filed certificate of record on appeal RT filed in DC 05/19/92 [91-30224] (sm)

6/15/92 10 day oral extension by phone of time to file Appellee's brief. [91-30224] appellees' brief due 7/6/92; optional reply brief due 14 days from service of answering brief (cb)

7/7/92 Filed Appellant Reshat Shabani's motion to extend time to file reply brief until 8/4/92, served on 7/6/92 [2169343] (work in progress, per PROMO/ahh) [91-30224] (sm)

7/8/92 Filed original and 15 copies appellee USA's 39 pages brief, 1 Supplemental Exc. vols; served on 7/6/92 [91-30224] (sm)

8/4/92 Received orig. 15 copies Reshat Shabani's reply brief (Informal: n) of 4 pages; served on 7/30/92 deficient late, motion to file pending. [91-30224] (sm)

8/10/92 Received USA additional citations, served on 8/5/92 (CASEFILE) [91-30224] (sm)

8/24/92 Calendar check performed [91-30224] (mw)



8/24/92 Filed order (Deputy Clerk; 1p) Movant is informed that a motion for an extension of time to file a brief should include the position of opposing counsel. Ninth Cir. R. 31-2.3(b)(8). Appellant's motion for an extension of time in which to file the optional reply brief is granted. The optional reply brief received 08/04/922 [*sic*] is ordered filed. [2169343-1] [91-30224] (sm)

8/24/92 Filed original and 15 copies Reshat Shabani reply brief, (Informal: n) 4 pages; served on 7/30/92 [92-30224] (sm)

9/2/92 Received Reshat Shabani additional citations, served on 9/1/92 (CASEFILE) [91-30224] (sm)

9/29/92 Calendar check performed [91-30224] (mw)

10/7/92 Calendar materials being prepared. [91-30224] [91-30224] (mw)

10/13/92 CALENDARED: Seattle December 10, 1992 9:00 a.m. * * * MOVED T [*sic*] TUES DEC 8 * * [91-30224] (mw)

10/23/92 Requested District Court to transmit record on appeal. Requested by: Johnny k. (jk)

10/26/92 Filed, as of 06/01/92 certified record on appeal in 6 Vols. (total): 5 Clerks Rec. 1 RTs (Original) [91-30224] [91-30224] (sm)

12/7/92 Received USA additional citations, served on 12/3/92 (PANEL) [91-30224] (sm)

12/8/92 ARGUED AND SUBMITTED TO J. C. WALLACE, Eugene A. WRIGHT, Edward LEAVY [91-30224] (tsp)

12/8/92 Received in Seattle, Reshat Shabani additional citations, served on 12/8/92 (PANEL) (sm)

2/17/93 Received Reshat Shabani additional citations, served on 2/16/93 (PANEL) [91-30224] (sm)

5/10/93 Received Reshat Shabani additional citations, served on 5/6/93. (PANEL) [91-30224] (jlc)

5/17/93 FILED OPINION: REVERSED REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. J. C. WALLACE, concurring; Eugene A. WRIGHT, author; Edward LEAVY.) FILED AND ENTERED JUDGMENT. [91-30224] (ck)

5/24/93 Filed USA motion to extend time to file petition for rehearing until 7/1/93, served on 5/21/93 [2358151] (sm)

5/24/93 Filed order (Deputy Clerk: sm) FOR GOOD CAUSE SHOWN, IT IS HEREBY ORDERED that the Plaintiff-Appellee USA may have until 07/01/93, to file a petition for rehearing and suggestion for rehearing en banc [2358151-1] [91-30224] (s [sic]

6/30/93 [2381504] Filed original and 40 copies Appellee USA petition for rehearing



with suggestion for rehearing en banc 11 p.pages, served on 6/29/93 (PANEL AND ALL ACTIVE JUDGES) (sm)

9/22/93 Filed order (J.C. WALLACE, Eugene A. WRIGHT, Edward LEAVY) The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED [2381504-1] [91-30224] (s [sic]

9/30/93 MANDATE ISSUED [91-30224] (jr)

10/8/93 Filed motion to recall the mandate; [91-30224] served on 10/7/93 to (EAW) [2442152] (jr)

10/14/93 Filed order (Eugene A. WRIGHT): The motion by the plaintiff, United States of America, to recall the mandate is GRANTED. This court's mandate is recalled and will be stayed for 30 days from the date of this order. [2442152-1] [91-30224] (sm)

10/15/93 Filed order (Eugene A. WRIGHT,): Aple's mtn to recall the mandate is GRANTED. This ct's mandate is recalled & will be stayed for 30 days from the date of this order. [91-30224] (mhf)

11/9/93 Filed USA's motion to extend day of mandate; [91-30224] served on 11/8/93 to *(EAW). [2461278] (jr)

11/17/93 Filed order (J. C. WALLACE): The government's motion is GRANTED. The stay of mandate issued on 10/14/93,

is extended to 12/21/93 pending the filing of a government petition for writ of certiorari. [2461278-1] [91-30224] (s [sic]

12/30/93 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 93-981 filed on 12/21/93. [91-30224] (sf)

3/2/94 Received notice from Supreme Court, petition for certiorari GRANTED on 2/22/94 (crw)



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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Case No. A90-063CR

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UNITED STATES OF AMERICA, PLAINTIFF

v.

RESHAT SHABANI, A/K/A LEE SHABANI, DEFENDANT

---

INDICTMENT
[Filed Aug. 29, 1990]

COUNT I:
Conspiracy
Vio. of 21 U.S.C. § 846

THE GRAND JURY CHARGES THAT:

**COUNT I**

Beginning on or about March 7, 1990, and continuing until on or about March 25, 1990, both dates being approximate and inclusive, within the District of Alaska and elsewhere, RESHAT SHABANI, a/k/a LEE SHABANI, did unlawfully and knowingly combine, conspire, confederate and agree with Dzemil [*sic*] Pinjoli, a/k/a "Jack", Pamela Mayfield and other persons known and unknown to the Grand Jury, to distribute cocaine, a Schedule II Narcotic-Controlled

Substance in violation of Title 21, United States Code, Section 841(a)(1), all of which is in violation of and contrary to Title 21, United States Code, Section 846.

A TRUE BILL.

/s/ Dale H. Long
Grand Jury Foreman

/s/ Wevley Wm. Shea
WEVLEY WM. SHEA
United States Attorney

/s/ Joseph W. Bottini
JOSEPH W. BOTTINI
Assistant U.S. Attorney



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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CR 90-63-HRH

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UNITED STATES OF AMERICA, PLAINTIFF

*v.*

RESHAT SHABANI, DEFENDANT

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**HEARING ON MOTION TO DISMISS INDICTMENT**

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BEFORE THE HONORABLE H. RUSSEL HOLLAND
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: KAREN L. LOEFFLER
Assistant U.S. Attorney
U.S. Attorney's Office
222 West 7th Avenue, #9
Anchorage, Alaska 99513
(907) 271-5071

For the Defendant: JOHN M. MURTAGH
Attorney at Law
1101 West 7th Avenue
Anchorage, Alaska 99501
(907) 274-8664

Court Recorder: PATTY DEMETER
U.S. District Court
222 West 7th Avenue , #4
Anchorage, Alaska 99513-7564

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1113 W. Fireweed Lane, Suite 200
Anchorage, Alaska 99503
(907) 276-3554

[2] ANCHORAGE, ALASKA—MONDAY, DECEMBER 10, 1990

(On record—8:33 o'clock a.m.)

THE CLERK: All rise. His Honor the Court, the United States District Court for the District of Alaska, is now in session, the Honorable H. Russel Holland presiding. Please be seated.

THE COURT: Good morning, ladies and gentlemen. We have set first this morning Case A90-063 CR, *United States* v. *Shabani*. When we last met on this matter, we made arrangements for the appointment of Mr. Ajdari as interpreter for the defendant. I'm not aware that any formal order has been entered in that regard yet, so Madam Clerk if you would check that for me and if a formal order has not been entered yet, would someone please find the standard form order that we use and get it to me so that I can sign that order?

Secondly, the—although not involved in what's going on today, I have signed an order appointing Mr. Cavanaugh to continue representation of Mr. Pinjoli



in connection with this case, since I have concluded that it is quite necessary that he be represented by counsel in connection with this proceeding.

Third thing, and the first of two that really have us here today, is a motion to dismiss the indictment filed after our last session. I have reviewed the papers that have been filed in support of an in opposition to the motion to [3] dismiss the indictment. We made no provision for replies so Mr.—I've lost one of my papers here, give me just a second to find what I've done with it. Mr. Murtagh, you did file an opposition to the—

MR. MURTAGH: I did, Your Honor.

THE COURT: —motion to dismiss.

MR. MURTAGH: No, excuse me, Your Honor. It was my motion to dismiss the indictment.

THE COURT: Oh, that's what—

MS. LOEFFLER: And my opposition.

MR. MURTAGH: The Government opposed.

THE COURT: That's why—I'm looking for something that doesn't exist. It is Monday morning. Mr. Murtagh, it's up to you, any reply you wish to offer at this point.

MR. MURTAGH: I wasn't able to find anything more than what was contained in the pleadings. I think I suggested in my argument and proposed order the basis for the Court to dismiss the indictment would be to conclude that the statement in *Tablemen* is outdated because of a later case from the Ninth Circuit that emphasized not in the context of an § 846, the importance of listing all the elements in an

indictment. The language in *Tablemen* seems to suggest that an overt act free indictment is sufficient. At least that's how I interpreted the language I cited in my pleading.

THE COURT: Well, I kind of think that's what the [4] case says, too, and I have a great deal of difficulty with it. I—as you know, I had thought about this situation some before the problem arose, I've now had a chance to look at it with some care. I guess I've got one question before I tell you what I think about the situation.

Ms. Loeffler, there was some discussion of the Government reindicting in this case simply as a precautionary measure. Has anything like that happened?

MS. LOEFFLER: It hasn't happened and it's not going to, Your Honor. Based on my review of the law, we will not reindict.

THE COURT: Well, that's sort of the message that I though I saw in your paperwork.

MS. LOEFFLER: No, we won't, Your Honor.

THE COURT: It is with considerable reluctance and a lot of caution that I turn a blind eye to Ninth Circuit precedence. I normally feel a very high obligation to follow them, even if I don't dis—even if I don't agree with the result. In this instance, I not only disagree with the result reached in the *Tablemen* and *Hernandez* cases, but I think they're just demonstrably illogical, not clearly thought out, they're totally at odds with what every other circuit in the country has done, and I've come to the conclusion that those cases are simply wrong when they say that an overt act has to be proved under 21 U.S.C. § 846.



[5] In the first place, § 846 is very conspicuous when placed in parallel and compared to 18 U.S.C. § 371 in that the latter expressly requires an overt act, and § 846 contains no such requirement. The plain language of the statute simply doesn't require the Government to plead or prove an overt act in support of a drug conspiracy.

It strikes me that the result reached in *Tablemen* and *Hernandez* create a totally illogical situation in that the cases suggest that the Government can indict without having any evidence of an overt act; the Government can subject a defendant to trial or at least to indictment without any proof whatsoever of an overt act. And yet when it comes to trial, these cases seem to say, oh, well, that's different, you have to prove an overt act when it comes to trial, even though you didn't have to have any evidence of it to indict. I think that's totally illogical.

It invites the Government to indict in situations where it perhaps cannot prove a case, it invites the Government to set up what in many instances could be a surprise situation for the defendant, in that the indictment need not allege any overt acts, but when it comes to trial, in theory at least, the Government can pull whatever evidence of overt acts it has out of that hat, as it were, without any disclosure of what it was that they were going to prove at trial. It invites surprise for the defendant, and I think that makes [6] no sense.

For these reasons, I am going to deny the motion to dismiss the indictment, and I'm not given to doing this, Mr. Murtagh, but if there's a conviction in this case, I very much hope that you will take this matter up to the Ninth Circuit Court of Appeals because I

think they need to look at this situation, look at it thoughtfully and thoroughly. I am concerned that what we have in *Tablemen* and *Hernandez* are knee-jerk reactions from overworked panels who come to a conspiracy case with a preconceived notion that, of course, conspiracies require the proof of overt acts without any serious analysis of whether that was really the intent of Congress or not. So the motion to dismiss will be denied.

* * * * *



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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CR 90-63-HRH

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UNITED STATES OF AMERICA, PLAINTIFF

*v.*

RESHAT SHABANI, DEFENDANT

---

**HEARINGS ON MOTIONS REGARDING INDICTMENT**

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APPEARANCES:

For Plaintiff: Karen Loeffler

For Defendant: John Murtagh

At 8:34 a.m. court convened.

Court heard.

Isan Ajdari appointed interpreter for Defendant

Motion to Dismiss Indictment Denied.

Plaintiff's Motion to introduce prior testimony of Mr. Pinjoli to be rescheduled for December 11, 1990 at 8:30 a.m.

At 8:47 a.m. court adjourned.

cc: J. Bottini
J. Murtagh
US Marshal
Probation Office

Date: December 10, 1990
Deputy Clerk's Initials: PLD



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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CR 90-63-HRH

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UNITED STATES OF AMERICA, PLAINTIFF

*v.*

RESHAT SHABANI, DEFENDANT

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VOLUME III—DAY 3
TRANSCRIPT OF TRIAL
BEORE THE HONORABLE H. RUSSEL HOLLAND
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

For the Plaintiff: KAREN L. LOEFFLER
Assistant U.S. Attorney
U.S. Attorney's Office
222 West 7th Avenue, #9
Anchorage, Alaska 99513
(907) 271-5071

For the Defendant: JOHN M. MURTAGH
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[3-2] ANCHORAGE, ALASKA—WEDNESDAY, JANUARY 16, 1991

(On record at 9:10 o'clock a.m.)

(Jury Out)

THE CLERK: All rise. His Honor, the Court, this United States District Court for the District of Alaska is now in session, the Honorable H. Russel Holland presiding. Please be seated.

THE COURT: This is the continuation of trial in Case A90-63 Criminal, *United States of America versus Shabani*. Counsel, I have copies of the final version of the jury instructions for you. I think that you will find that we have incorporated into those instructions the few changes and additions that we talked about yesterday afternoon. I would alert you to one thing: there are a couple of instances in which I simply changed the order of the instructions because I thought it made more sense to read an instruction here rather than there. But with that exception, the instructions are exactly as we discussed them.

(Pause)



Does the Government have any exceptions to the instructions that I propose to give?

[3-3] MS. LOEFFLER: No, we don't, Your Honor.

THE COURT: Does the Government have any exceptions to my failure to give any requested informations?

MS. LOEFFLER: No, we don't.

THE COURT: Mr. Murtagh, does the defendant have any exceptions to the instructions that I propose to give?

MR. MURTAGH: Yes, Your Honor. As to Jury Instruction No. 22, this connects up with the discussion we had earlier in this case as to the Ninth Circuit's interpretation of the elements under the statute at hand, the clear language of the Ninth Circuit case of *United States v. Tabelman*, T-a-b-e-l-m-a-n, indicates that an overt act is an element of that offense. I think the record has had this discussion on it on several occasions. When we were dealing with the indictment sufficiency, it should be noted that five pages prior to its listing the elements in *Tabelman*, *Tabelman* said an indictment without that element was sufficient. So that's really all the farther the Court had to conduct the analysis in the sense of the indictment sufficiency. I recognize that the Government has submitted sort of a historical analysis of that language and concludes that it arises from a historical anomaly or mistake. But on the printed page of the Ninth Circuit decisions, it says that an overt act is a requirement and Instruction 22 does not contain that.

THE COURT: Thank you, sir. The exception is noted. And as I indicated to you earlier, Mr. Murtagh,

if there's a conviction in this case, I quite literally invite [3-4] you to take this matter up. I think the Ninth Circuit Court of Appeals has really not considered the fact that Congress very obviously created the distinction between the 18 U.S.C. 371 conspiracy and the Title 21 [U.S.C.] 846 conspiracy, and I think they simply haven't noted the difference. The exception is noted, but Instruction 22 will stand. Are there any other exceptions to the instructions that I propose to give?

MR. MURTAGH: No, Your Honor.

MS. LOEFFLER: No, Your Honor.

THE COURT: And any exceptions, Mr. Murtagh, to—I'm not sure there were any defense-requested instructions. But anything that I am not instructing on that you think I should be instructing on?

MR. MURTAGH. No, sir.

THE COURT: Okay. Thank you. We're ready now for closing arguments. Would you call the jury in?

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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CR 90-63-HRH

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UNITED STATES OF AMERICA, PLAINTIFF

*v.*

RESHAT SHABANI, DEFENDANT

---

JURY INSTRUCTION NO. 22

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The defendant is charged in the indictment with conspiring to distribute cocaine in violation of Title 21, United States Code, Section 846. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First: beginning on or about March 7, 1990, and continuing until on or about March 25, 1990, there was an agreement between two or more persons to distribute cocaine in violation of 21 U.S.C. § 841(a)(1); and

Second: the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it.

A conspiracy is a kind of criminal partnership—an agreement of two or more persons to commit one or more crimes. The crime is the agreement to do something unlawful; it does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the crimes alleged in the indictment as an object of the conspiracy.

One becomes a member of a conspiracy by knowingly participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who knowingly joins an existing conspiracy is charged with the same responsibility as if that person had been one of the originators of it. On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a member merely by associating with one or more persons who are conspirators, or merely by knowing of the existence of a conspiracy.



Once you have decided that the defendant was a member of a conspiracy, the defendant is responsible for what other conspirators said or did to carry out the conspiracy, whether or not the defendant knew what they said or did.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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Case Number: A90-063CR

UNITED STATES OF AMERICA

*v.*

RESHAT SHABANI A/K/A
LEE SHABANI, DEFENDANT

---

[Filed June 5, 1991]

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JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After Nov. 1, 1987)

George C. Howard
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[X] was found guilty on count I after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|---|---|---|---|
| 21 U.S.C. § 846 | CONSPIRACY | March 7, 1990 | I |



The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[ ] Count(s) _____ (is) (are) dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $ 50.00, for count I, which shall be due [X] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 574-72-2888

Defendant's Date of Birth: February 16, 1992

June 5, 1991
Date of Imposition of Sentence

Defendant's Mailing Address:

Cook Inlet Pretrial Facility
1300 East 4th Ave.
Anchorage, AK 99501

[signature illegible]
Signature of Judicial Officer

H. RUSSEL HOLLAND, U.S.DISTRICT JU
Name & Title of Judicial Officer

Defendant's Residence Address:

SAME AS ABOVE 6/5/91

Date

[Page 2 of 3] IMPRISONMENT

The defendant is hereby committed to the custody of the United states Bureau of Prisons to be imprisoned for a term of 160 months, with credit for time served [to be allowed] [initial illegible].

[ ] The court makes the following recommendations to the Bureau of Prisons:

[X] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district.

[ ] at _____ a.m. p.m. on _____.

[ ] as notified by the United States marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

[ ] before 2 p.m. on _____.

[ ] as notified by the United States marshal.

[ ] as notified by the probation office.



[Page 2 of 3] RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

United States Marshal

By _____

Deputy Marshal

[Page 3 of 3] SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 60 months UNLESS DEPORTED.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[X] The defendant shall report in person to the probation office in the district to which the defendant is

released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of the supervised release.

[X] The defendant shall not possess a firearm or destructive device.

(1) Defendant shall submit to urinalysis testing, and substance abuse counseling as directed by the Probation Office.

(2) Defendant shall submit financial statements as directed by the Probation Office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation



officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

cc: J. Bottini, G. Howard, J. Gibbons, R. Shabani, US Marshal, Probation Office, Magistrate Judge Branson, Carmen



SUPREME COURT OF THE UNITED STATES

No. 93-981

UNITED STATES, PETITIONER

*v.*

RESHAT SHABANI

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ORDER ALLOWING CERTIORARI. Filed February 22, 1994.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted

February 22, 1994